(412) 644-5754

Date: July 31, 2002
Case No.: 87-STA-12

In the Matter of

ROBERT C. LEIDIGH,

Complainant,

v.

FREIGHTWAY CORPORATION,

Respondent.

Appearances:

John G. Rust, Esquire
For the Complainant

C. Drew Griffith, Esquire
For the Respondent

Before: GERALD M. TIERNEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Section 405 (employee protection provision) of the Surface Transportation Assistance Act of 1982[1] ("STAA") (codified as amended at 49 U.S.C. § 31105). Congress included Section 405 in the Surface Transportation Assistance Act to insure that employees in the commercial motor transportation industry who make safety complaints, participate in STAA proceedings, or refuse to commit unsafe acts, do not suffer adverse employment consequences because of their actions. See *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (citing 128 Cong. Rec. 29192, 32510 (1982)).[2] The Act prohibits discipline

[1] 96 Stat. 2157.

[2] Furthermore, Congress enacted the STAA to combat the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents" on the nation's highways. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (quoting remarks of Sen. Danforth and summary of proposed statute at 128 Cong. Rec. 35209, 32510 (1982)); *see also*

(continued...)

of trucking employees who raise violations of commercial motor vehicle rules on the part of trucking companies, recognizing that drivers are often in the best position to detect when an operation is not running safely, but that employees often may not report violations for fear of backlash from their employers. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987); *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980 (4th Cir. 1993) *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356 (6th Cir. 1992); *Lewis Grocer Co. v. Holloway*, 874 F.2d 1009, 1011 (5th Cir. 1989).

Procedural Background

Robert Leidigh ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") on July 22, 1986, alleging that he was terminated by Freightway ("Respondent") in violation of Section 405 of the STAA.[3] In particular, the Complainant alleges that Respondent terminated him for filing safety complaints with OSHA.[4] The Secretary of Labor, acting through its authorized agents, investigated the complaint in accordance with Section 31105(c)(2)(A), and determined that there was not probable cause to believe that Respondent violated Section 405. The Complainant disputed the finding, and requested a formal hearing. The Complainant seeks reinstatement of his employment and restoration of his July, 1976 seniority date. (TR2 at 144).

For the sake of clarity, Complainant's separate claims are referred to only insofar as

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[2](...continued)
Lewis Grocer Co. v. Holloway, 874 F.2d 1009, 1011 (5th Cir. 1989) ("Congress enacted the STAA to promote safe interstate commerce of commercial motor vehicles."). See also *Roadway Express, Inc. v. Dole*, 929 F.2d 1060 (5th Cir. 1991).

[3] Post-hearing, the Complainant moved to admit two additional STAA complaints filed by the Complainant (filed April 6, 1987 (blacklisting) and December 6, 1990 (termination for refusing dispatch due to fatigue)). In each case, the OSHA regional administrator determined that there was probable cause to believe that the Respondent violated the STAA. No objection has been received to their admission. Each complaint is admitted and marked as CX 31 and CX 32, respectively.

[4] The Complainant also generally alleges that his termination was influenced by, among others, his union status as a member of the Teamsters Democratic Union, his filing of grievances with the union, and his initiation of other administrative proceedings against the Respondent. However, these separate allegations relating to his termination do not constitute "protected activity" under the STAA. Protected activity under the STAA is (1) making safety complaints; and, (2) refusing to drive when doing so would be unsafe. 49 U.S.C. § 31105(a). Complainant's counsel's request for a hearing relating to his union related allegations is hereby denied, as these allegations are irrelevant to the STAA inquiry.

necessary for the present determination.[5]

On March 3, 1987, OSHA informed the Complainant determining that, after an investigation, the complaint lacked merit. (ALJX 1). The Secretary's findings, dated February 10, 1987, conclude that "there is not reasonable cause to believe that the respondent has violated Section 405(a) or 405(b) of the STAA. The Secretary found that the Complainant refused a transfer to the Respondent's Toledo terminal, and the Complainant denied that his refusal constituted a voluntary quit. The Secretary found that the Complainant's also protected activity under the Act occurred in February of 1985, when he complained of defective brakes. The Secretary found that the Complainant "took a swing" at Kaplan before he ran off the property in October of 1985.

On March 24, 1987, OSHA referred the Complaint to the Office of Administrative Law Judges for a formal hearing based on the Complainant's objections to the Secretary's findings and Preliminary Order.

I held a hearing on October 25, 1989, in Toledo, Ohio.[6] (ALJX 2). At the time of the hearing, the parties, on the Complainant's motion, determined that the STAA proceedings should be "deferred" to the result of the concurrent NLRB complaint.[7] (ALJX 2 at 3-14).

This Complaint was dismissed by the Secretary of Labor on July 9, 1990, as a result of my recommended approval of a settlement agreed to by the parties. (ALJX 3). The Complainant prevailed on his unlawful refusal to rehire complaint before the NLRB, who reinstated the

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[5] Complainant filed a separate STAA complaint in 1988, alleging that he had been illegally blacklisted in 1986. Complainant also filed a complaint with the NLRB based on his blacklisting allegations. Ultimately, on February 6, 1992, the Complainant settled his NLRB claims (Nos. 8-CA-20032 and 8-CA-20455), in which he agreed to tender his resignation effective January 31, 1992 and to refrain from seeking employment with Freightway or Kaplan Enterprises in the future. Thus, a genuine issue of law exists whether the Complainant can seek reinstatement in this complaint; however, despite my request at the hearing, the parties have failed to brief the legal issue propounded by these facts.

[6] The lengthy delay between referral and the hearing is attributable primarily due to the Complainant's efforts to retain counsel and to facilitate settlement negotiations.

[7] The Complainant testified that he was willing to accept the determination of the NLRB, and have its determination apply to his complaint. (ALJX 2 at 4-6). The Complainant interjected into a discussion regarding the comparative remedies of the STAA and the NLRA that he understood that he would lose ten years of seniority under the NLRB's determination because his NLRB complaint was predicated on a failure to rehire and blacklisting, whereas the case was based on his termination. (ALJX 2 at 8). Knowing that he could lose the ten years of seniority, the Complainant agreed to "defer" to the determination of the NLRB. (ALJX 2 at 13-14).

Complainant with seniority to 1986- the date he was refused rehire. (ALJX 5).

The Complainant subsequently requested that the complaint be reopened. On January 22, 1996, the Secretary of Labor determined that the settlement contained considerable question regarding the parties' intent on seniority, and remanded the complaint to me for a hearing on the merits.[8] (ALJX 6 & 6A). Pursuant to 29 C.F.R. § 1978.106(a), I conducted *de novo* formal hearings in Toledo, Ohio on May 14, 1996,[9] July 10, 1996, and July 11, 1996.

Based on the entire record,[10] I make the following:

FINDINGS OF FACT

The Respondent is engaged in interstate trucking operations operating commercial motor vehicles[11] in interstate commerce. In July of 1976, the Respondent hired the Complainant as a driver of a commercial motor vehicle. At all material times, the Respondent was a "person"[12] and the Complainant was a "employee"[13] as defined by the Act.

Background

Prior to May, 1986, the Respondent operated a terminal in Defiance, Ohio, that served as a broker operation for 30 to 40 tractors. The Respondent ran their drivers out of the Defiance

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[8] In a letter dated April 28, 1997, addressed to President Clinton and the U.S. Department of Labor, the Complainant states that the Order of Remand contains several errors. The Complainant states that he was reinstated with his 1976 seniority in March of 1990. He goes on to state that a union order lead to the Respondent changing his seniority to 1986, "contrary to the agreement." This letter is received into the record and marked as ALJX 6B.

[9] During the course of the May 14, 1996, hearing, the parties indicated that they were close to reaching an agreement to settle the Complainant's complaint. (TR1 at 28-30). I continued the hearing, and permitted the parties 45 days to reach a settlement in lieu of a hearing and an administrative determination. The parties did not reach a settlement, and the matter was reset for hearing on July 10, 1996.

[10] The record consists of the following: TR1 - May 14, 1996 hearing; TR2 - July 10, 1996 hearing; TR3 - July 11, 1996 continuation of hearing; ALJX 1 through ALJX 8; and, Complainant's Exhibits (CX) 1 through 32.

[11] 49 U.S.C. § 31101(1).

[12] 49 U.S.C. § 31101(3).

[13] 49 U.S.C. § 31101(2).

terminal. (TR2 at 207).

B&H Trucking was an owner/operator that leased commercial motor vehicles to Freightway. On April 30, 1986, Jay L. Kaplan ("Mr. Kaplan"), president of Freightway Corporation, sent a letter to its drivers informing them that B&H Trucking was canceling their lease with Freightway effective May 24, 1986. (CX 11).[14] This lease termination effectively closed the Defiance terminal. (TR2 at 208). Freightway owned a certain number of tractors, and would be forced to eliminate some of its positions. (TR2 at 208). The lease termination forced Freightway to center its operations out of Toledo, but it now permitted its drivers to drive the vehicles home while between runs. In a letter sent to all Freightway drivers, Mr. Kaplan explained the drivers' options in light of the lease termination:

> The loss of the B & H operation will have a direct effect on our ability to provide equipment for our customers, and will limit the number of drivers we will be able to retain. Therefore, we must know the following:
>
> 1. Which drivers will exercise their seniority right, and transfer to Toledo to drive a Kaplan Enterprises truck? There are approximately 18 units available.
>
> 2. Which drivers will entertain the option to be an Owner-Operator? We will need approximately 30 units.
>
> 3. Which drivers are going to retire? Who will seek employment elsewhere?
>
> This information must be in our office no later than May 10, 1986. Please contact Rich Pursel, during office hours, with your decision.

All drivers received this letter. (TR2 at 153). Mr. Kaplan further states that he should be contacted for further information or clarification. Mr. Kaplan held driver meetings in which he explained Freightway's plans to retain as many current drivers as the conditions permitted. (TR2 at 243). Freightway considered a driver's non-response to the request for election to be a voluntary quit or resignation. (TR2 at 209).

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[14] Despite the Complainant's assertion, there is no evidence of record to suggest that the action taken by the Respondent in response to the B & H lease termination was designed to remove the Complainant as "a thorn in their side." (See Complainant's Brief at 2). I find it unfortunate for the Complainant that counsel's brief is long on tangential rhetoric and short on legal application of the applicable standards to the facts of *this* complaint.

Trailer 665 Safety Complaint[15]

Gary Eitzman ("Mr. Eitzman"), a part time mechanic at the Napoleon truck stop, stated that on April 11, 1986, the Complainant instructed him to perform work on Freightway trailer number 665. (CX 2, 4). Mr. Eitzman made the following repair: "back off brakes of back axle, and single out rear axle." Mr. Eitzman also noticed flat spots on some tires, and stated that the trailer was not safe to be on the road. On March 16, 1987, Mr. Eitzman made an additional written statement explaining the reason why the tires "blew." (CX 5). Mr. Eitzman opined that the brakes were locking up when the Complainant applied the brakes. Mr. Eitzman further stated, "the dispatcher said to single the two axles on same side and let the other side go. The trailer was not safe to be running down the road." (Emphasis in original). The Complainant acknowledged that the trailer was equipped with a new braking system that he was not comfortable with. (TR2 at 198-99).

The Complainant submitted a "breakdown report" for trailer number 665 dated April 11, 1986. (CX 3; TR2 at 110). The Complainant apparently suffered a flat tire, as the tires on the trailer were switched and the brakes released. The Complainant testified that he considered the truck to be dangerous. (TR2 at 112-14). On April 17, 1986, the Complainant addressed a letter to OSHA, Mr. Kaplan, and his union, and stated his belief that he was being singled out for his refusal to drive trailer 665 because he believed it had defective breaks. (CX 17).

Prior Termination/Fear of Mr. Kaplan

On October 25, 1985 Complainant submitted a Grievance Form, no. 38232, complaining that he was unjustly terminated. (CX 6). The Complainant was terminated after he claimed that Mr. Kaplan chased him off the company's property on or about October 12, 1985. (TR2 61, 149). Apparently, a disagreement arose regarding the Complainant's annual physical; an argument ensued and the Complainant left the property.[16] Mr. Kaplan testified that the company is under strict regulations to provide physicals to its drivers, and that a constant system was

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[15] In a separate safety-related incident, Mr. Kaplan testified that the Complainant made a panic stop which caused tire problems and said that the brake system needed to be adjusted. (TR2 at 230). (CX 26). Mr. Kaplan testified that his review of the tractor's records failed to reveal any mechanical problem. (TR2 at 234). Subsequently, the 121 brake system was removed from the vehicles pursuant to government request. (TR2 at 234).

Complainant filed a previous OSHA complaint in 1983. (CX 8).

[16] Ed Lietaert ("Mr. Lietaert") described an event in April of 1985 in which Mr. Kaplan poked his finger and then struck the palm of his hand into Mr. Lietaert's chest. Mr. Kaplan then made a fist, but did not strike Mr. Lietaert. Mr. Kaplan apologized. (CX 1). The Complainant testified that he was uncertain about whether he knew of this incident at the time he alleged Mr. Kaplan ran him off the property. Thus, the evidence presented by the Complainant on this point is of questionable relevance.

necessary to ensure compliance. (TR2 at 213). The Complainant testified that he left the property because he feared that Mr. Kaplan would physically assault him. (TR2 64). There was no physical contact between the two. The Complainant continued to be employed by the Respondent until June of 1986 without further aggravation of this incident. (TR2 at 150). The Complainant could not remember if they were any adverse job-related consequences of the altercation. (TR2 at 151). Mr. Kaplan testified that he heard a commotion outside of his office and, when he inquired to the Complainant concerning his problem with receiving the physical, the Complainant ran out the door. (TR2 at 214). Although tempers flared, Mr. Kaplan testified that there was no physical contact. (TR2 at 215). Mr. Kaplan testified that, while the Complainant did not appear frightened at the time, the Complainant "acted a little strange sometimes," and Mr. Kaplan dismissed this episode based on his understanding of the Complainant's personality.[17] (TR2 at 243).

The findings of the OSHA regional administrator bring to light that the Complainant "took a swing at" Mr. Kaplan, a fact that neither testified to at the hearing.

Fear of Working for Kaplan/ Request for Protection Assurance

The Complainant testified that he was afraid of the prospect of working for Kaplan Enterprises in Toledo, which motivated his failure to respond to the May 10, 1986 deadline. (TR2 at 82, 157). The Complainant decided to enlist the support of his union in seeking "protection" from Mr. Kaplan. (TR2 at 82, 84). The Complainant wanted a promise that he would not be harmed if he were to accept the transfer to Toledo. (TR2 at 85). In fact, the Complainant states in his brief that "this entire problem would not have arisen" had Mr. Kaplan provided an assurance. (Compl. Brief at 5-5A). Yet, the Complainant acknowledges that the Union contract does not require the Respondent to provide that assurance. (TR2 at 198). Mr. Kaplan denied ever receiving a request for an assurance of protection, and further stated that such a request would be unnecessary because he does not attack people. (TR2 at 249, 256). If asked, Mr. Kaplan would have offered an assurance that the Complainant would not be attacked or threatened. (TR2 at 249). Richard L. Pursel, operations manager for Freightway, denied that the Complainant expressed his fear of Mr. Kaplan as a reason for not making his decision. (TR3 at 351).

Grievance Relating to Extant Complaint[18]

The Complainant filed a grievance in June of 1986, following his termination on June 3, 1986. (CX 7). In the 1986 grievance, the Complainant admits that he did not meet the May 10,

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[17] Mr. Kaplan later testified that the Complainant has "a short wick" which prompted the company to "just let him go and cool off." (TR2 at 249).

[18] Complainant filed a grievance in 1982. (CX 19). The Complainant could not recall what the grievance was about. (TR2 at 117).

1986 deadline, states that his position is explained in his May 23, 1986 letter, and asserts that his termination was retaliatory and he was "dismissed without reason or authority." The Complainant did not prevail on that grievance. (TR2 at 91).

Complainant's Transportation to New Duty Station

On May 17, 1986, the Complainant wrote a letter to Ernie Williams, requesting that Local 20 answer his letter "in view of the May 24 decision," and also stated that "Rich [Pursel] is trying to force me to quit in view of my old car, which is not dependable anymore." (CX 9).

Respondent's Response to Complainant's Transportation Issue

On May 19, 1986, Mr. Pursel sent a letter to the Complainant stating Mr. Pursel's understanding of a May 19, 1986 conversation in which the Complainant expressed that he does not have personal transportation to the Toledo terminal. (CX 13). The Complainant testified that Mr. Pursel wanted the Complainant to report to work at the Toledo terminal. (TR2 at 89). The Complainant stated that he was "left completely in the dark by Freightway" and he stated that he had no knowledge of Freightway's plan to permit or require drivers to take their tractors home with them. (TR2 at 89). Mr. Pursel requested that the Complainant sign a voluntary resignation form.

Respondent Seeks Complainant Statement of Intention/Election

Mr. Pursel contacted the Complainant for a response, but he stated that the Complainant was very noncommital. (TR3 at 278). Mr. Pursel was concerned with the Complainant's decision because he had ten years of seniority with the company and his decision affecting every driver with less seniority. (TR3 at 278). Mr. Pursel even extended the May 10 deadline so that the Complainant could provide a response. (TR3 at 279). Mr. Pursel testified that the Complainant generally stated that he did not know what he wanted to do, and that he wanted to talk to the union. Mr. Pursel informed the Complainant that he would only have to get to the Toledo terminal one time, and that was to pick up a tractor. Mr. Pursel stated that he was in contact with the Complainant on an almost daily basis. (TR3 at 279). Mr. Pursel further testified that the Complainant's late wife called Mr. Pursel and told him to get off of the Complainant's back because Mr. Pursel was badgering the Complainant. (TR3 at 279, 306). Mr. Pursel testified that the Complainant never gave him an answer. (TR3 at 280). Mr. Pursel testified that he contacted the Complainant seven or eight times prior to the May 10 deadline. (TR3 at 327).

On May 24, 1986, the Complainant wrote a letter to H. Leu, president of Teamsters Local No. 20. (CX 10). The Complainant requests that the union respond to his request for "advice, and counsel on my situation in regard to the May 24, 1986," decision and deadlines.

Complainant Seeks Union Intervention

In a May 10, 1986 letter, the Complainant requested that Mr. Leu advise him of his options under the April 30 request. (CX 16). The Complainant stated that he cannot buy a tractor and does not have a car. The Complainant requested information concerning his rights with the unemployment bureau, a withdrawal card if his employment is interrupted, and his options under the union contract. The Complainant never received a response to his protection inquiry. (TR2 at 86).

Complainant's Request for Union Advice/ Voluntary Layoff

On May 23, 1986, the Complainant sent a letter to Mr. Kaplan, Mr. Leu, and the Ohio Bureau of Unemployment Compensation. (CX 12). The letter states:

> Due to the Defiance Ohio terminal closing, and circumstances beyond my control, including deadlines by Freightway Corp., and no response to my questions of this situation from Teamsters Local 20 Toledo, Ohio, I have been forced under pressure and without the advise of counsel, to make decisions not in my best interest. I request a Co Vol layoff, until such time I can exercise my Co seniority.[19]

The Complainant testified that the union never responded to his inquiries. (TR2 at 155). He further testified that both the union and the company have to agree to the voluntary layoff. (TR2 at 165). The voluntary layoff was never awarded to the Complainant. (TR2 at 166). The layoff would have preserved the Complainant's seniority. (TR3 at 329).

The Complainant testified that he sought a leave pursuant to the union contract so that he "could get representation from [his] union."[20] (TR2 at 86).

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[19] In support of his position requesting the voluntary layoff, the Complainant introduced evidence that another driver was granted a layoff. In an October 14, 1986 letter, George Reeder, logistics coordinator for Freightway, explained the circumstances concerning the lay-off status of Marion Howard. (CX 15). Mr. Howard was given a voluntary layoff for medical reasons. Both Mr. Kaplan and Mr. Pursel testified that the voluntary layoff was granted only for legitimate reasons, such as medical conditions or family emergencies. (TR2 at 247; TR3 at 281). Mr. Kaplan would not have granted the layoff to a driver without a legitimate reason because that driver would have to be replaced for the 90 day period, and then the replacement driver would have to be let go when the laid off driver returns at the end of 90 days. (TR2 at 248). The large expense involved in procuring trucks prevented the company from maintaining extra trucks to provide for the voluntary layoffs of its drivers. (TR2 at 248).

[20] The Complainant's reliance on Marion Howard's leave request being granted is severely misplaced, as the Complainant admits on direct examination that Mr. Howard has a medical condition giving rise to the request. (TR2 at 94). The Complainant has neither alleged

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Mr. Pursel explained that a voluntary layoff was impractical under the circumstances and that it was not one of the three options made available to the drivers. (TR3 at 330-31). The voluntary layoff was impractical because the Complainant was fairly high on the seniority list and Mr. Pursel needed the Complainant's decision before he could honor the requests of less senior drivers. Because a certain number of drivers were needed, granting the Complainant's request for a 90 day layoff would force the company to layoff a driver when the Complainant returned. Thus, that driver would have been deprived of the opportunity to seek replacement employment during the interim.

The Complainant asserts that the Respondent terminated him rather than offer him his options under the contract. (TR2 at 159).

Respondent Seeks Complainant's Election

The Complainant testified that he informed Mr. Pursel that he sent some papers into the union, but Mr. Pursel responded that he needed the Complainant's decision "right away." (TR2 at 87). Mr. Kaplan testified that the Complainant informed him that he would not exercise one of the three available options, and that he did not want to work out of the Toledo operation. (TR2 at 211). Mr. Kaplan further testified that the Complainant did not raise the transportation issue to him. (TR2 at 211). The Complainant testified that he did not exercise his seniority option to drive a Kaplan Enterprises truck, did not exercise his option to become an owner/operator, and did not exercise his option to seek employment elsewhere. (TR2 at 154, 160-61).

Complainant Unavailable for Dispatch for Three Consecutive Days

On June 4, 1986, Mr. Pursel sent a letter to the Complainant stating that, due to his unavailability for dispatch since May 23, 1986 and his failure to contact the office since May 27, 1986, the company has accepted his voluntary resignation. (CX 14; TR3 at 283-85). The Complainant testified that he received notice from the Respondent which he interpreted to mean he was terminated. (TR2 at 87). The Complainant testified that his grievance was denied because the termination was determined to be proper. (TR2 at 171). Mr. Pursel stated that his name has been removed from the seniority list as of June 3, 1986. Mr. Kaplan testified that Freightway did not know the Complainant's election under the April letter, and that it is standard practice in the industry to send out a voluntary resignation form after a driver failed to make himself available for dispatch for three consecutive days. (TR2 at 239). Mr. Pursel also testified that no contact from a driver for three consecutive days constitutes a voluntary resignation; the company then sends the driver a request to sign a voluntary resignation form. (TR3 at 284). If the driver does not return the resignation form, he is considered to have quit voluntarily. (TR3 at 284).

The Complainant admits that the union contract permits an employer to terminate a driver

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[20](...continued)
nor proven a medical condition warranting consideration of his leave request.

who has not contacted the employer for three days. (TR2 at 161). The Complainant could not recall whether or not he contacted the Respondent on May 31, 1986, June 1,2, or 3, 1986. (TR2 at 164).

Voluntary Resignation

The Complainant denied that he voluntarily resigned. (TR2 at 90, 130). The Complainant further testified that he continued to fear for his safety, which prevented him from reporting to the Toledo terminal. (TR2 at 91). The Complainant testified that he would have reported for work and driven out of Toledo if Mr. Pursel or Mr. Kaplan would have told him he had nothing to fear. (TR2 at 91).

Negative Employment References

The Complainant testified that a prospective employer, whose name he cannot remember, informed him that he passed their written and road tests and that they would have to first check with Freightway before hiring him. (TR2 at 132). The Complainant testified that he did not hear back from the prospective employer, which prompted him to file charges with OSHA and the NLRB based on "blacklisting." (TR2 at 132). The Complainant testified that he prevailed on these charges. (TR2 at 133).

On December 1, 1986, Midwest Coast Transport, Inc. ("MCT") requested that Freightway provide an employment reference on the Complainant. (CX 21). Freightway listed 3 preventable accidents on MCT's form, and stated that they would not rehire the Complainant due to "the legal expense to defend the charges filed with OSHA, National Labor Relations Board, and other government agencies. All of the past charges filed were determined to be unfounded. Mr. Pursel also stated that it is difficult to determine the number of days missed due to on-the-job injuries because of multiple workers' compensation claims filed by the Complaint for anxiety, depression, eye fatigue, nervousness, hernia and stress. On December 15, 1986, Freightway responded similarly to a request for a reference from Cargo. (CX 23). Mr. Pursel reviewed the Complainant's driver card before completing the forms. (TR3 at 287). Whether the company would rehire or not is not maintained on the driver's card or file; rather, Mr. Pursel provided this response to prospective employers based on his knowledge of the driver. (TR3 at 289). Mr. Pursel testified that the Complainant was difficult to work with, but he did not attempt to blackball the Complainant through the employment inquiries. (TR3 at 291). Mr. Kaplan denied presenting any false information to a prospective employer. (TR2 at 264-65).

These allegations formed the basis of the Complainant's blacklisting complaint filed with OSHA in 1987.

MCT Application Falsification

In a July 3, 1987 letter to Freightway, MCT stated that the Complainant was not qualified

to drive MCT's equipment because of "application falsification." (CX 25). The Complainant listed one preventable accident within the last three year, while MCT's phone checks and written verification show two preventable accidents in the last three years. The Complainant denied falsifying his application. (TR2 at 136).

Complainant's Accidents/ Absenteeism

The Complainant admitted that he was involved in three accidents while employed by the Respondent, and that he cannot remember whether each was his fault, i.e., chargeable or preventable. (TR2 at 124). The Complainant admitted that he had some absenteeism problems with the employer; he attributed these problems to occupational stress resulting from deadlines and log hour difficulties. (TR2 at 129). Moreover, he acknowledges that his employment application with MCT contained inaccurate information regarding the number of accidents he was involved in. (TR2 at 189-90). He further admitted that there are several ways to check the driving record of a driver, such as through the insurance company or the Department of Transportation.

NLRB Settlement

The Complainant testified that he entered into a settlement in 1992 to settle his NLRB claim. (TR2 at 174). The settlement called for the Complainant to resign from employment with Freightway and not to seek re-employment, and provided monetary payments of $500 per week to the Complainant. (TR2 at 174-75).

Freightway Bankruptcy

In November of 1992, Freightway filed for Chapter XI bankruptcy protection. (TR2 at 218). Up until the time of the bankruptcy petition, Freightway was making payments to the Complainant pursuant to the settlement of the 1989 settlement agreement. (TR2 at 219). A reorganization plan was approved by the Bankruptcy Court in Toledo, and the Complainant filed a proof of claim which was allowed. (TR2 at 221). Under the reorganization plan, the Complainant's payments would be stretched out over a longer time period. (TR2 at 222).

Respondent Denies Termination Based on Filing Complaints

Under cross-examination, Mr. Kaplan denied that the "only thing you had against him was the fact that he filed charges against your company with the union, NLRB, and OSHA." (TR2 at 229). Mr. Kaplan stated that the company had a lot of grievances filed against the company, but that they never held it against the driver. Mr. Kaplan denied that the company seized the lease termination/reorganization as an opportunity to rid itself of the Complainant. (TR2 at 263).

Respondent Encourages Safety Complaints

Mr. Kaplan testified that Freightway had the highest safety record that the industry can offer, and that it encourages safety complaints and takes them very seriously. (TR2 at 258). Freightway maintains a complaint procedure where drivers can fill out a form in the drivers' room voicing a safety complaint or repair request. Mr. Kaplan testified that timely delivery schedules were dependent on operating safely maintained vehicles. (TR2 at 259).

Respondent Believes the Complainant Acted in Bad Faith

The Complainant testified that he acted in good faith in making each and every complaint and grievance. (TR2 at 105). Mr. Pursel testified that he thought the Complainant was acting in bad faith when he made his complaints to OSHA. (TR3 at 309). Moreover, the Complainant never gave the company an opportunity to rectify a problem before filing an OSHA complaint. (TR3 at 310-11). Mr. Pursel denied ever stating to the Complainant that filing an OSHA charge will affect his company standing. (TR3 at 360). Mr. Pursel also denied that the Complainant's "termination" was retaliatory for his OSHA complaints, union grievances, or any other agency complaint he made against the company. (TR3 at 368). Mr. Pursel simply stated that, "Mr Leidigh was terminated for failure to contact our office for a three-day period. Per the union contract, that was looked upon as a voluntary resignation." (TR3 at 368).

Collective Bargaining Agreement

The collective bargaining agreement ("CBA") in effect at the time of these occurrences provides, in Article 5, that seniority "shall only be broken by discharge, voluntary quit, retirement, or more than three (3) years layoff." (CX 18). Article 42 provides that a leave of absence may be granted to a driver for up to ninety (90) days, and that permission must be secured from both the Union and the employer. Article 42 further provides that the driver "must make suitable arrangements for continuation of Health and Welfare and Pension payments before the leave may be approved by either the Local Union of the Employer." (CX 18 at 94). Lastly, and perhaps most relevant, the CBA provides, in Article 46, that:

> Any driver who absents himself from work for three consecutive days without notification to the Employer shall be considered a voluntary quit. It is further agreed that no new hearing shall be required in the case of a voluntary quit.

(CX 18 at 104).

LEGAL DISCUSSION

The STAA prescribes discriminatory employment practices against drivers engaged in reporting or refusing to drive unsafe vehicles.

(1) A person may not discharge an employee, or discipline or discriminate against an

> employee regarding pay, terms, or privileges of employment, because--
>
> (A)the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because--
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
>
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable[21] only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105 (West 1997).

The United States Supreme Court has summarized the three-prong burden-shifting analysis applicable to employment discrimination cases, such as the STAA,[22] in the following manner:

> First, the [complainant] has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the [complainant] succeeds in proving the prima facie case, the burden shifts to the [respondent] to articulate some legitimate, non-discriminatory reason for the employee's rejection. Third, should the [respondent] carry this burden, the [complainant] must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the [respondent] were not its true reasons, but were a pretext for discrimination.

Texas Dept. Of Comm. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). *See McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *Accord Keller v. Orix Credit Alliance, Inc.*, 105 F.3d 1508 (3rd Cir. 1997).

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[21] A driver's perceived apprehension of an unsafe condition is measured in terms of objective reasonableness "in light of the situation that confronted the employee at the time." *Yellow Freight Systems, Inc. v. Reich (Thom)*, 38 F.3d 76, 82 (2nd Cir. 1994).

[22] *See Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (*McDonnell Douglas* burden-shifting analysis applicable to STAA).

PRIMA FACIE CASE

A prima facie case of discrimination under the STAA requires proof, by a preponderance of the evidence, of three elements: (1) that he engaged in protected activity; (2) that he was subjected to adverse action; and, (3) that a causal link exists between the protected activity and the employer's adverse action. *Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). *See also Watson v. Smallwood Trucking Company, Inc.*, 94-STA-3 (Sec'y Oct. 6, 1994). The Complainant must also present evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Dec. 15, 1992).

Protected Activity

The Complainant engaged in activity protected by the STAA when he raised safety concerns to the Respondent and filed a complaint with OSHA relating to trailer No. 665 in April of 1986.

Adverse Employment Actions

The Complainant generally asserts that the Respondent's alleged discriminatory conduct resulted in the loss of his employment and the loss of his 1976 seniority date. No other terms, conditions or privileges of employment are alleged to be involved here.[23] It is well recognized that termination and loss of seniority are adverse employment actions. *See, e.g., Hamilton v. Sharp Air Freight Services, Inc.*, 91-STA-49 (Sec'y July 24, 1992). For purposes of this element alone and as discussed below, I will assume that the Complainant was "terminated" from employment. Additionally, I will also consider the Respondent's denial of the Complainant's request for a voluntary layoff as an adverse employment action. Accordingly, the Complainant's alleged termination and corresponding loss of seniority meet the second element of his prima facie case.

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[23] Subsequent to the hearing in this matter, the United States Supreme Court extended the protection of Title VII's anti-retaliatory provision to employment recommendations sought on behalf of a former employee. *Robinson v. Shell Oil Company*, 117 S. Ct. 843 (1997). *See* 42 U.S.C. § 2000e-3(a). Thus, discriminatory and retaliatory practices occurring after cessation of employment are actionable under federal anti-discrimination statues. Here, the Complainant have proven facts somewhat similar to those presented in *Robinson* insofar as a prospective employer contacted the Respondent as a reference in connection with the Complainant's employment application. As a result, the facts presented pertaining to the negative employment reference give rise to an adverse employment action. However, the circumstances surrounding the Complainant's blacklisting charge was investigated pursuant to his 1987 OSHA complaint.

Causation

The temporal proximity between the protected STAA complaints and the disciplinary action may raise an inference of causation sufficient to establish a prima facie case of unlawful discrimination. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). Yet, temporal proximity alone will not support an inference of causation where compelling evidence exists that the Respondent encouraged safety complaints. *Moon*, 836 F.2d at 229. Here, there is a temporal proximity between the Complainant's April, 1986 complaints to the Respondent and OSHA and his May, 1986 loss of employment. However, the credible testimony establishes that the Respondent is a safety conscious outfit that encouraged drivers to submit their safety concerns. Thus, the causal inference has not been established by the temporal proximity of his complaint and the adverse employment actions. Moreover, the Complainant has filed previous safety complaints without suffering adverse employment actions, and has been terminated for reasons wholly unrelated in time or cause to his safety complaints.[24]

The Complainant can establish a causal link by showing he was subject to disparate treatment or by showing that the Respondent acted out of discriminatory animus[25] towards him. *Castle Coal & Oil Co. v. Reich*, 55 F.3d 41, 46 (2nd Cir. 1995). The Complainant has presented no evidence of disparate treatment.[26]

The causation element of the discrimination prima facie case relates to the employer's specific reasons for the adverse employment action. Thus:

> The key to establishing a causal connection focuses on the employer's motivation or intention with regard to the adverse employment action. To establish a causal connection, the evidence should support a finding that retaliatory motive animated the adverse employment action.

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[24] The Complainant's complete employment history does not appear in the record. However, the Complainant was terminated in 1985 for the altercation related to his physical, and was re-employed by the Respondent after the events contained herein.

[25] "Animus" is defined as "[m]ind; soul; intention; disposition; design; will; . . ." BLACK'S LAW DICTIONARY 87 (6th Ed. 1990). *See also Reliance Ins. Co. v. NLRB*, 415 F.2d 1 n.4 (8th Cir. 1969) (defining "animus" as "ill-will, antagonism, hostility, or animosity").

[26] The Complainant's reliance on the voluntary layoff granted to Marion Howard is misplaced. Howard's layoff was granted for medical reasons, and was not requested in the midst a the B & H lease termination, as was the Complainant's. The record contains no evidence that the Respondent granted a layoff to any driver under the same circumstances as requested by the Complainant.

Reich v. Hoy Shoe Co., Inc., 32 F.3d 361, 367-68 (8th Cir. 1994) (citation omitted). The central inquiry here is whether discriminatory animus based on the Complainant's STAA protected activity motivated the Respondent to cause the adverse employment actions.

In this regard, the Complainant does not identify a causal link between his protected activity and his adverse employment actions. I have examined the voluminous records in this complaint, and found no direct evidence from which to argue that a causal connection exists. The record contains inferential evidence that the Respondent would not rehire the Complainant due to many factors including his safety complaints. However, there is a distinction between a company's termination of an employee and its refusal to rehire. Thus, whereas a company's termination of an employee may result from an identifiable, legitimate business decision, it is reasonable for the employer to consider all of the circumstances relating to that employment in considering whether it would, in retrospect, rehire the employee. Here, there is no evidence of a causal link between the Complainant's discharge and his safety complaints, although there may be a link between his complaints and the Respondent's subsequent failure to rehire.

RESPONDENT'S PROFFERED REASONS FOR ADVERSE EMPLOYMENT ACTIONS[27]

The Respondent asserts that its removal of the Complainant from its employment and seniority list was done for legitimate non-discriminatory reasons. The Respondent asserts that it terminated the Complainant for business reasons relating to both the B & H lease termination and the Complainant's failure to make himself available to the Respondent for three consecutive days. The Respondent has met its limited burden of rebuttal by proffering legitimate non-discriminatory reasons for the Complainant's termination. Either one of these reasons is sufficient to sustain the Respondent's burden of production.

PRETEXT FOR DISCRIMINATION

The Complainant may prevail on his complaint of discriminatory termination upon a showing that the reasons for termination proffered by the Respondent were a mere pretext for discriminatory animus. A pretext is defined as an "[o]stensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense." BLACK'S LAW DICTIONARY 1187 (6th ed. 1991). The Supreme Court has recognized the tendency of a

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[27] Although my finding of no causal connection between the Complainant's protected activity and his adverse employment actions precludes relief under the Act, I address the remaining elements of the McDonnell Douglas analysis in order to provide a complete discussion of this complaint, which is now more than ten years old.

proffered reason for termination to camouflage discriminatory animus.[28] *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The United States Supreme Court, in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993), stated that, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false and that discrimination was the real reason." The Second Circuit has held that pretext can be demonstrated by "evidence of inconsistencies or anomalies that could support an inference that *the employer did not act for its stated reason.*" *Keller*, 105 F.3d at 1523 (quoting *Sempier v. Johnson & Higgins*, 45 F.3d 724, 731 (3rd Cir. 1995)) (emphasis in original).

The reason the Complainant was not employed by the Respondent after June 4, 1986, is that he failed to make himself available for dispatch for three consecutive days subjecting himself to termination based on company policy and the collective bargaining agreement. Nothing presented by the Complainant intimates that this reason was false. Perhaps the Respondent could have been more forbearing of the Complainant's absence, but the lease termination forced it to pare down its work force to permit continued operations, and it could not afford to retain a driver that continually vacillated and did not make himself available. These are legitimate business reasons that the Complainant has not proven to be false. The Complainant has not proffered evidence tending to show that "discrimination was the real reason" for his discharge and loss of seniority. Although the STAA protects the Complainant from adverse employment actions, his protected status does not afford him more privileges, such as the right to a layoff, as a result of his protected activity. *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1065 (5th Cir. 1991) (stating that the STAA "does not, however, confer any special benefit on them for whistle blowing). The Complainant received equal treatment. The Respondent's actions were guided by its stated reasons.

Accordingly, the Complainant has not demonstrated that the Respondent's reasons for his termination and loss of seniority were a pretext for discrimination. As a result, I find that the Respondent did not discriminate against the Complainant in violation of Section 405 of the

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[28] In *Furnco Construction Corp.*, the Court explained,

> we know from experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we assume generally acts with some reason, based his decision on an impermissible consideration . . .

Furnco Construction Corp., 438 U.S. at 577. This consideration prompted the Supreme Court to adopt the well-known *McDonnell Douglas* burden-shifting analysis. *Keller v. Orix Credit Alliance, Inc.*, 105 F.3d 1508, 1518 (3rd Cir. 1997).

Surface Transportation Assistance Act.

REINSTATEMENT

Based on my finding that the Respondent did not discriminate against the Complainant under the STAA, the Complainant is not entitled to reinstatement.

RESTORATION OF SENIORITY

Based on my finding that the Respondent did not discriminate against the Complainant under the STAA, the Complainant is not entitled to restoration of his 1976 seniority. Nothing in this decision shall affect the Complainant's seniority as determined by other administrative findings.

CONCLUSIONS OF LAW

1. The Surface Transportation Assistance Act governs the parties and the subject matter.

2. The Complainant demonstrated that he was engaged in protected activity when he made complaints to the Respondent regarding the safety of the Respondent's vehicles.

3. The Complainant has demonstrated that he suffered an adverse employment action.

4. The Complainant has failed to demonstrate a causal connection between his protected activity and his adverse employment action.

5. The Respondent has demonstrated a legitimate non-discriminatory reason for the alleged termination.

6. The Complainant has not demonstrated that the Respondent's proffered non-discriminatory reason was pretextual.

7. The Complainant has not sustained his burden under the McDonnell Douglas burden shifting analysis, and, thus, has not established that he was discriminated against in violation of the Surface Transportation Assistance Act.

RECOMMENDED ORDER

Based on the forgoing, IT IS HEREBY RECOMMENDED that the complaint of Robert Leidigh be DISMISSED.

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GERALD M. TIERNEY
Administrative Law Judge

GMT/JWC/ir